

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 5, 2009 Session

SPYDELL DAVIDSON v. NADER BAYDOUN

Appeal from the Circuit Court for Davidson County
No. 08C-2631 Hamilton V. Gayden, Judge

No. M2008-02746-COA-R3-CV - Filed July 31, 2009

The issue on appeal is whether the plaintiff's claim for legal malpractice is barred by the statute of limitations, Tenn. Code Ann. §28-3-104(a)(2). In the Complaint, the plaintiff alleges that his former attorney committed malpractice by failing to present relevant evidence at trial of damages he had sustained, thereby depriving the plaintiff from recovering those damages. The trial court dismissed the Complaint pursuant to Tenn. R. Civ. P. 12.02(6) on the ground the plaintiff's malpractice claim accrued more than a year before he commenced this action. We have determined the plaintiff had knowledge of the defendant's professional negligence during the previous trial, which was more than a year before he commenced this action. The plaintiff, however, did not sustain an actual injury as a result of the defendant's negligence until weeks after the trial, when the trial court's final order was entered, which was within one year of the commencement of this action. A claim for legal malpractice accrues when the plaintiff knows, or should have known, the attorney was professionally negligent *and* the plaintiff sustains an actual injury as a result of that negligence. These two essential elements did not exist more than one year prior to the commencement of this action; thus, the plaintiff's claim for legal malpractice did not accrue more than one year prior to the commencement of this action. Accordingly, we reverse the dismissal of the Complaint.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Beau E. Pemberton, Dresden, Tennessee, for the appellant, Spydell Davidson.

Darrell G. Townsend and Hugh C. Gracey, Nashville, Tennessee, for the appellee, Nader Baydoun.

OPINION

The matters before the court arise from the Complaint filed in this action by Spydell Davidson against attorney Nader Baydoun for damages allegedly resulting from Baydoun's negligent representation of Davidson during the trial of a civil action between Davidson and Mid-South Industries, Inc.

In 2004, Mid-South filed suit against Davidson for breach of contract. Davidson responded by filing a Counter-Claim against Mid-South for breach of contract and fraud. Davidson represented himself pro se in the Mid-South litigation until November 18, 2005, when he retained Baydoun to represent him in that matter.

Signs of significant discontent with Baydoun's representation appeared as early as September 2006, as evidenced in two letters Davidson sent to Baydoun. In the letters, Davidson expressed his displeasure with Baydoun's representation, including, *inter alia*, pre-trial discovery responses Baydoun had submitted to Davidson for his approval.¹ Davidson scolded Baydoun for his "sub" standard performance.² Baydoun responded to Davidson's criticism in a reply letter. Thereafter, Davidson and Baydoun apparently mended fences, and the case proceeded to trial with Baydoun representing Davidson at all times during the trial.

The three-day trial of the Mid-South action began on June 19, 2007. During the trial, Davidson complained to Baydoun about his representation, stating that Baydoun had negligently failed to present evidence of his various damages.

At the conclusion of the trial on June 21, 2007, the trial court announced its ruling from the bench, including findings of fact.³ Although our record does not provide the specific terms of the court's bench ruling, it appears the trial court found that Davidson was entitled to recover damages from Mid-South, but the exact amount of the damages Davidson was entitled to recover would have to be recalculated based on the findings announced from the bench.⁴

¹ In a September 21, 2006 letter to Baydoun, Davidson wrote:

The standards you are working at are sub. This must be changed immediately by correcting your false documents that were presented in our "Response in Opposition to Motion To Dismiss."

I direct your attention to page 2, heading A. Facts.

My only conclusion to this page is:

- 1) You do not know my case at all.
- 2) You were drunk when you wrote it.
- 3) Or you were drugged in our response.
- 4) You are misrepresenting the truth as some lawyers do.

² Also on September 21, 2006, apparently shortly after faxing the first letter, Davidson wrote to Baydoun stating: "Please disregard the letter I just faxed to you today, in order that we may benefit from your knowledge and experience in my case. . . . In the future I only desire the truth be presented as facts to the best of our ability. . . ."

³ The specific findings are not stated in the record on appeal.

⁴ Although we do not have the benefit of the trial court's ruling and findings from the bench, it is apparent from the Final Order entered on August 23, 2007, that the court awarded damages to Mid-South for expenses incurred while storing Davidson's equipment. The trial court also awarded damages to Davidson for unrecovered costs and Mid-South's

(continued...)

The Final Order in the Mid-South litigation was entered on August 23, 2007, resulting in an award in favor of Davidson in the amount of \$49,088.02. The award was less than Davidson believed he was entitled to recover from Mid-South. This is evident from Davidson's August 30, 2007 letter to Baydoun wherein he stated, in no uncertain terms, that he had been damaged by Baydoun's negligent representation during the trial.⁵ Thereafter, for reasons not explained in the record, Davidson waited until August 12, 2008, to commence this action against Baydoun.

In his pro se Complaint, Davidson alleged that Baydoun negligently failed to present relevant evidence during the Mid-South trial, and that Baydoun's negligence was the reason the trial court did not award Davidson all of the damages he was entitled to recover from Mid-South, and that Davidson was injured by Baydoun's negligent representation.

Baydoun filed a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted on the grounds that the applicable statute of limitations, Tenn. Code Ann. §28-3-104(a)(2), barred Davidson's claim. Specifically, Baydoun contended that Davidson suffered a legally cognizable injury when the trial court announced its ruling from the bench on June 21, 2007. Davidson opposed the motion contending that he did not suffer a legally cognizable injury until the Final Order was entered on August 23, 2007, which was less than one year prior to the commencement of this action. After hearing arguments on the motion, the trial court found that Davidson's legal malpractice claim was time barred because it accrued on June 21, 2007, more than one year prior to the commencement of this action. Thereafter, the trial court entered an order granting the Motion to Dismiss, from which Davidson appeals.

STANDARD OF REVIEW

The purpose of a Tenn. R. Civ. P. 12.02(6) Motion to Dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal sufficiency of the complaint. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). It does not challenge the strength of the plaintiff's proof. *Id.* In reviewing a motion to dismiss, we must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696-97 (Tenn. 2002); *Pursell v. First Am. Nat'l Bank*, 937 S.W.2d 838, 840 (Tenn. 1996). Thus, a complaint should not be dismissed for failure to state a claim *unless* it appears that the plaintiff can prove no set of facts in support of his or her claim that

⁴(...continued)

use of Davidson's equipment. But, the trial court also determined that Mid-South was not liable for "unrecovered costs" for three particular pieces of equipment. Accordingly, the court instructed accountant David Wood to recalculate the exact damages to be awarded to each party and those to be offset, and once that was completed the parties were to submit a proposed order consistent with Wood's calculations.

⁵In the letter, Davidson stated he would offset the damages resulting from Baydoun's negligent representation against the legal fees owed to Baydoun.

would warrant relief. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848 (Tenn. 1978). Making such a determination is a question of law. Our review of a trial court's determination of an issue of law is de novo, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Ctr., P.C.*, 70 S.W.3d 710, 712-13 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

An action for legal malpractice must be brought within one year from the date the cause of action accrues. Tenn. Code Ann. § 28-3-104(a)(2).

A cause of action for legal malpractice accrues and the statute of limitations is triggered when: 1) the defendant committed negligence; 2) the defendant's negligence caused the plaintiff to suffer a "legally cognizable" or actual injury; and 3) the plaintiff knows, or in the exercise of reasonable care and diligence should have known, that the injury was caused by the defendant's negligence. *Hartman v. Rogers*, 174 S.W.3d 170, 173 (Tenn. Ct. App. 2005) (citing *Carvell v. Bottoms*, 900 S.W.2d 23, 28, 30 (Tenn. 1995); *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876, 878-79 (Tenn. 1981); *Caledonia Leasing & Equip. Co. v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt*, 865 S.W.2d 10, 13 (Tenn. Ct. App. 1992)). In a legal malpractice action, "the one-year statute of limitations starts to run when the client suffers a legally cognizable injury resulting from an attorney's negligence . . . , and the client knows or should know the facts sufficient to give notice of that injury." *Cherry v. Williams*, 36 S.W.3d 78, 83 (Tenn. Ct. App. 2000).

[T]he rules governing when a person suffers legally cognizable injury from litigation malpractice must take into account that not every misstep leads to a fall. Because negligence without injury is not actionable, the legal malpractice statute of limitations does not begin to run until an attorney's negligence has actually injured the client. And there is no injury until there is the loss of a right, remedy, or interest or the imposition of a liability. Before that time, any injury is only prospective and uncertain. There is no legally cognizable injury where there exists only the mere possibility of harm.

Id. at 84 (internal citations omitted).

This case was dismissed upon a Tenn. R. Civ. P. 12.02(6) motion to dismiss; therefore, we will limit our analysis to the relevant facts asserted in Davidson's Complaint, presume the alleged facts to be true and give Davidson the benefit of all reasonable inferences to be drawn from those factual allegations. See *Trau-Med of Am., Inc.*, 71 S.W.3d at 696-97; *Pursell*, 937 S.W.2d at 840. The Complaint, in pertinent part, states that Davidson entered into a contract for the sale of used metal working equipment with Mid-South Industries, Inc.; that Mid-South sued Davidson for breach of contract in 2004; that Davidson represented himself pro se until retaining the legal representation of Baydoun on November 18, 2005; and that Baydoun represented Davidson thereafter, throughout the trial of the Mid-South litigation. The Complaint also states that the following acts or omissions by Baydoun occurred during the trial of the Mid-South action:

7. Throughout the proceedings, Baydoun was negligent in his representation of Davidson as follows:

- a. Failed to present to the Court evidence that the sale of the building was a Breach of Contract;
- b. Failed to present to the Court evidence of fraud in the Complaint filed by opposing counsel and on information and belief failed to present this evidence in order to prolong the proceedings;
- c. Failed to present to the Court evidence that there was a return of three (3) large pieces of equipment returned to [Mid-South] before the 1999 auction to mitigate damages resulting from their breach of contract;
- d. Failed to present evidence in Court that Mr. Davidson was refused the return of his equipment but he was continued to be charged rent for storage and was refused access to the building in order to remove his equipment;
- e. Failed to object the sale of my equipment while litigation was on going and neglected to oppose them spending the money realized from the sale in an amount of approximately \$250,000.
- f. Failed to present evidence to the Court that he proceeds from the 1999 auction was largely from additional items brought to the auction in an effort to mitigate damages.

Davidson also alleged in the Complaint that he entrusted Baydoun with representing his interest “in an action to recover damages resulting from fraud on the part of [Mid-South] at trial and [Baydoun] was negligent in his representation of [Davidson’s] legal interest” in the Mid-South litigation. Further, Davidson alleged that as a result of Baydoun’s professional negligence, he has been “damaged by being barred from collection of all damages which occurred as a result of the sale of his equipment.”

Baydoun has conceded, for purposes of the Rule 12 motion only, that he negligently represented Davidson. The Complaint makes it clear that Davidson, who was in attendance throughout the Mid-South trial, was aware that Baydoun failed to introduce all relevant evidence at trial. Therefore, Davidson was aware, on or before June 21 that Baydoun was negligent in his representation of Davidson as the Mid-South trial was proceeding; however, an attorney’s negligent act may not inflict an immediate injury on the client. Moreover, negligence without injury is not actionable. *Security Bank & Trust Co. of Ponca City, Okla. v. Fabricating, Inc.*, 673 S.W.2d 860, 864 (Tenn. 1983); *Ameraccount*, 617 S.W.2d at 878; *Cherry*, 36 S.W.3d at 84.

The right to a remedy for an attorney's negligence will not commence until the client has suffered an actual injury. *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998). “[I]t may be stated as an invariable rule that when the injury, however slight, is complete at the time of the act, the statutory period then commences, but, when the act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage. . . .” *John Kohl & Co.*, 977 S.W.2d at 532 (quoting *State v. McClellan*, 85 S.W. 267, 270 (Tenn. 1905)). Furthermore, “the injury element is not met if it is contingent . . . or amounts to a mere possibility.” *Id.* (quoting *Caledonia*, 865 S.W.2d at 17).

As the foregoing reveals, the mere fact Davidson was aware on or before June 21, 2007, that Baydoun was negligent does not establish the requisite element that Davidson knew or should have known that he suffered an actual injury as a consequence of that negligence. Accordingly, the dispositive issue in this appeal is when did Davidson have actual or constructive knowledge that he suffered an actual injury, a “legally cognizable injury” as a consequence of Baydoun’s negligence. *See Cherry*, 36 S.W.3d at 83.

Baydoun contends that Davidson suffered a legally cognizable injury when the trial court rendered its bench ruling on June 21, 2007. Conversely, Davidson contends he did not suffer a legally cognizable injury until the Final Order was entered on August 23, 2007. If Baydoun is correct, Davidson’s action is time barred. If Davidson is correct, his action was timely filed.

When a client is injured as a result of its attorney’s negligence was the issue in *Ameraccount Club, Inv. v. Hill*, 617 S.W.2d 876 (Tenn. 1981). The dispute in that matter arose out of the defendant attorney’s representation of Ameraccount in its efforts to file a patent application. *Id.* at 876. The attorney filed the application on behalf of Ameraccount in December 1974, but, through oversight, failed to perfect the application until March 13, 1975. Further, the attorney failed to conduct a search of the Patent Office records. As a result, an intervening application filed on February 28, 1975, took precedence over Ameraccount’s application. Ameraccount was first informed of the attorney’s negligence and the intervening application on August 15, 1975. The shareholders of Ameraccount held a meeting shortly thereafter, during which they agreed that their attorney had acted negligently. *Id.* at 877. On April 27, 1976, months after the shareholders’ meeting, the Patent Office officially refused to register Ameraccount’s mark. On August 27, 1976, more than a year after the shareholders’ meeting, Ameraccount filed suit against its former attorney for malpractice. *Id.* The issue on appeal in that matter was whether the one-year statute of limitations barred Ameraccount’s claim. *Id.* The Tennessee Supreme Court held that “[a]lthough the plaintiff may have been aware of the defendant attorney’s ‘negligence’ as early as August 18, 1975, . . . no damage or injury resulted to the plaintiff by reason of that ‘negligence’ until on or about April 27, 1976, when the United States Patent Office rejected the plaintiff’s application.” *Id.* at 878. Further, the Supreme Court held that the statute of limitations did not start to run when Ameraccount became aware of the negligence, because “*still more was required, viz., damage or injury to the plaintiff resulting from that negligence.*” *Id.* at 878 (emphasis added). The statute of limitations *did not start to run until both elements were satisfied*: Ameraccount having knowledge of the attorney’s negligence *and* Ameraccount sustaining an injury that was caused by the attorney’s negligence. *See Id.*

Davidson knew he was injured, Baydoun contends, when the trial court announced its ruling, and the statute of limitations was not tolled for Davidson to ascertain the exact extent of his injuries, which would be revealed in the final judgment.⁶ In making this argument, Baydoun relies on the established rule that a plaintiff in a legal malpractice action “cannot . . . wait until he knows *all of the injurious effects* or consequences of an actionable wrong.” *Carvell*, 900 S.W.2d at 27 (quoting *Sec. Bank & Trust Co.*, 673 S.W.2d at 864-865). If an injury has occurred, the plaintiff may not take a “wait and see” approach; whether the injury is corrected on appeal “does not erase the fact that the injury had occurred in the first place.” *Hartman v. Rogers*, 174 S.W.3d 170, 174 (Tenn. Ct. App. 2005). As the courts have explained, “the standard for accrual of the cause of action is ‘legally cognizable’ not ‘final disposition.’” *Id.* Davidson, however, insists there was no legally cognizable injury on June 21st because the bench ruling was merely an ambulatory ruling.

We believe Davidson has the better argument because a legally cognizable injury occurs when a party loses a right or remedy, and it is a court’s “judgment that decrees the loss of a right or remedy.” *Cherry*, 36 S.W.3d at 84-85. It was the Final Order that decreed the loss of Davidson’s right to collect further damages from Mid-South. *See Id.* Therefore, Davidson sustained an actual and legally cognizable injury when the judgment, the Final Order, was entered.

Our determination is consistent with the legal analysis utilized by the Court of Appeals of Indiana and Oregon in factually similar legal malpractice actions. In *Johnson v. Cornett*, 474 N.E.2d 518, 519 (Ind. Ct. App. 1985), the issue was which of two dates started the running of the statute of limitations. The malpractice claim in *Johnson* arose out of the defendant attorneys’ representation of Cornett in a previous case. *Id.* at 519. Like here, the trial court announced its ruling from the bench in the previous case; however, the final order was not entered until several weeks later. As is the case here, the complaint filed by Cornett, which was filed more than a year after the bench ruling but less than a year from the entry of the final order, was challenged by a motion to dismiss on the ground it was time barred. The Indiana court ruled that the statute of limitations did not begin to run until the final order was entered, and, therefore, Cornett’s complaint was filed within the statute of limitations by one day. *Id.* As the Indiana Court of Appeals explained:

[Defendants] maintain that the damage occurred when the trial court announced its intentions. However, the decision at that point could still be altered. In other words, the decision was not final. A trial court has broad latitude and up to the time a decision is final may re-think its position. Thus, the court’s initial pronouncement was completely ambulatory until . . . the time it issued its final order.

Johnson, 474 N.E.2d at 519 (internal citation omitted).

⁶The record reveals that the trial court stated from the bench that damages would be awarded to Davidson but the court was reducing the award for three pieces of equipment, and, therefore, the total damages needed to be recalculated by David Wood, an accountant. The recalculation is reflected in the Final Order, which shows that the award was reduced to \$49,088.02. This is evidenced by the fact the amount of the award that had been typed in the Final Order was lined-out by the trial judge, and \$49,088.02 was written by hand.

The Oregon Court of Appeals applied the same principle in a legal malpractice action in *Barnard v. Lannan*, 829 P.2d 723 (Or. Ct. App. 1992). The *Barnard* court held that the order of dismissal, which was entered “during litigation, was interlocutory, non-appealable and subject to modification or reversal by the trial court.” *Id.* at 725 (citing *Nw. Med. Labs., Inc. v. Good Samaritan Hosp. & Med. Ctr.*, 770 P.2d 905 (Or. 1989); *Cenci v. The Ellison Co.*, 617 P.2d 254 (Or. 1980)).

Baydoun’s allegedly negligent acts and omissions occurred during the trial of the Mid-South action, and the injuries sustained by Davidson were a consequence of Baydoun’s representation during the course of that trial. Davidson’s injuries, however, were not incurred during the trial, but, rather, Davidson sustained a legally cognizable injury when the trial court entered the Final Order that decreed the loss of Davidson’s right or remedy to recover from Mid-South.

We have determined that the statute of limitations did not begin to run until the Final Order was entered on August 23, 2007. Davidson’s Complaint was filed on August 12, 2008. Accordingly, this action was commenced within the one-year statute of limitations for legal malpractice actions. *See* Tenn. Code Ann. §28-3-104(a)(2).

IN CONCLUSION

We, therefore, reverse the trial court’s decision to dismiss the Complaint as time barred and remand for further proceedings consistent with this opinion. Costs of this appeal are assessed against the defendant, Nader Baydoun.

FRANK G. CLEMENT, JR., JUDGE